FILED

98 610 OCT 1

OFFICE OF THE CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

****

WALLACE LEE CHAMBERS, ANNIE MAE CHAMBERS, AND EDWARD JOHNSON,

Petitioners

vs.

GAGE VAN HORN, M.D.

Respondent

* * * * * * * * * * * * * * * * * *

(Petition for Writ of Certiorari to the Supreme Court of Texas)

(Supreme Court of Texas case No. 97-0630;
Texas First Court of Appeals, No. 01-94-00981-CV;
Texas 133rd District Court, No. 91-17766B)

* * * * * * * * * * * * * * * * * *

THE CHAMBERS' AND JOHNSON'S PETITION FOR WRIT OF CERTIORARI

* *

GAYLE E. OLER, Texas State Bar 15254000
Suite 310, 4054 McKinney Ave.
Dallas, Texas 75204
Phone (214) 522-7282, Telecopier (214) 559-3124
ATTORNEY FOR PETITIONERS

39 pp

THE QUESTION PRESENTED FOR REVIEW

Whether the Texas Supreme Court denied the U. S. Constitution's 14th Amendment guaranty of equal protection of the laws to Chambers and Johnson, the hospital employees who were harmed by a known-to-be violent hospitalized patient in Van Horn's charge, by holding that Van Horn's status as a physician as a matter of law excluded him and them from operation and effect of the Texas common law imposing upon an actor the duty to control the conduct of a third person to prevent physical harm to another when (a) the actor has a special relation with the third person which imposes a duty of control, or (b) the actor has a special relation with the other person which gives to the other person a right of protection.

PARTIES TO THE PROCEEDING IN THE TEXAS SUPREME COURT

Petitioner in the Texas Supreme Court was Defendant Gage Van Horn, M.D. of Houston, Texas. (Counsel: Fulbright & Jaworski, Terry O. Tottenham and Dean A. Schaffer, 600 Congress Avenue, Suite 2400, Austin, Texas 78701, and Renee A. Forinash, 300 Convent Street, Suite 2200, San Antonio, Texas 78205. Respondents in the Texas Supreme Court and Petitioners in this Petition for Writ of Certiorari are Plaintiffs Wallace Lee Chambers and wife, Annie Mae Chambers, of Houston, Texas (the parents of Ronald Chambers, Deceased, a hospital employee who was killed in the occurrence in question. (Counsel: Gayle E. Oler, 4054 McKinney Avenue, Suite 310, Dallas, Texas 75204); and Plaintiff Edward Johnson of Houston, Texas; Johnson was a hospital employee who was injured in the occurrence in question. (Counsel for Johnson in the Texas Supreme Court was Ray Shackelford, HJ & M Building, 1406 Southmore Blvd. at Austin, Houston, Texas 77064; present trial counsel is Walter Strickland, HJ & M Building, 1406 Southmore Blvd. at Austin, Houston, Texas 77064. Counsel for this Petition for Writ of Certiorari is Gayle E. Oler, 4054 McKinney Avenue, Suite 310, Dallas, Texas 75204.)

TABLE OF CONTENTS

The Question Presented for Review i

Names of Parties and Counsel in the Texas Supreme Court. ii

Table of Contents iii

Index of Authorities v

Citation to official and unofficial reports entered in the case by the courts 1

Statement of grounds on which jurisdiction of the United States Supreme Court is invoked ... 1

The constitutional provisions involved in this case . 2

Concise statement of the case 3

Argument 5

Factual background 5

FIRST POINT 6

The Texas Supreme Court denied Petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment by holding that Van Horn's status as a physician as a matter of law excluded him from operation of Texas common law imposing a duty upon an actor to exercise reasonable care to control a person in his charge that he knows or should know is likely to cause physical harm to others, as stated in *Otis Engineering Co. v. Clark*, 668 S.W.2d 307, 309-

311 (Tex.1984) and restated in Section 315, clause (a) and Section 319, *Restatement, Second, Torts.*

Argument under First Point 7

SECOND POINT 26
The Texas Supreme Court denied Petitioners equal protection of the laws by holding that although they were hospital employees helping with the violent patient in Van Horn's charge, as a matter of law Van Horn did not owe them the duty of protection from the patient's violence under Texas common law restated in clause (b) of Section 315, *Restatement, Second, Torts.*

Argument under Second Point 23

Conclusion and prayer 26

Signature of Counsel 27

INDEX OF AUTHORITIES

Constitutions and Statutes

Constitution of the United States
Article Four 25
Fourteenth Amendment .. i,iii,2,5,7,8,9,23,25,28

Constitution of the State of Texas
Article I, Section 13 3,25

12 U.S.C. Sec. 1257 2

Texas Civil Practice and Remedies Code
Section 5.001 12

Cases

Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031,
97 L.Ed. 1586 (1953) 8

Bird v. W.C.W., 868 S.W.2d 767 (Tex.1994) ... 20

Bradley Center, Inc. v. Wessner,
296 So.2d 693 (S.Ct. Georgia 1982) 21

Buchanan v. Rose, 159 S.W.2d 109 (Tex. 1942) .. 18

Chambers v. Hermann Hospital Estate,
921 S.W.2d 177 (Tex.App.-Houston
[1st Dist.] 1996 1,4

Corfield v. Coryell, 6 F.Cas. 546, No. 3230
(C.C.E.D. Pa. 1823) 25

El Chico v. Poole, 732 S.W.2d 306 (Tex.1987) 17

Grigsby v. Reid, 153 S.W. 1124 (Tex. 1913) 13

Kerrville State Hospital v. Clark,
923 S.W.2d 582 (Tex.1996) 19.20

Lipari v. Sears, Roebuck & Co., 497 F.Supp. 185,
(D.C.Nebraska 1980) 27

Littleton v. Good Samaritan Hospital & Health Center,
529 N.E.2d 449 (S.Ct. Ohio 1988) 22

Naidu v. Laird, 539 A.2d 1064
(S.Ct.Delaware 1988) 22

Nashville, C & St. L. Railway v. Browning,
310 U.S. 362, 60 S.Ct. 968,
84 L.Ed. 1258 (1940) 12

New York Times Co. v. Sullivan, 376 U. S. 254,
84 S.Ct. 710, 11 L.Ed.2 686 (1964) 8

Otis Engineering Co. v. Clark,
668 S.W.2d 307 (Tex.1984) iii,7,14,15,17,19,20

Parham v. Hughes, 441 U.S. 347, 99 S.Ct. 1742,
60 L.Ed.2d 269 (1979) 9

Petersen v. State, 671 P.2d 230,
(S.Ct.Washington, 1983). 28

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251,
30 L.Ed.2d 225 (1971) 9

Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620,
134 L.Ed.2d 855 (1996) 23

Royster Guano Co. v. Virginia, 253 U.S. 412,
40 S.Ct. 560, 64 L.Ed. 989 (1920) 9

San Antonio Independent School District v. Rodriguez,
411 U. S. 1, 93 S.Ct. 1278,
36 L.Ed.2d 161 (1973) 9

Sexton v. Barry, 233 F.2d 220 (6th Cir., 1956,
cert. den. 352 U. S. 870 [1956]) 11

Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) 8.11

Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535, 62 S.Ct. 110, 86 L.Ed. 1655 (1942) 10

Tarasoff v. Regents of University of California, 17 Cal.3rd 425, 131 Cal.Rptr.14, 551 P.2d 334 (1976) 27

Thompson v. County of Alameda, 27 Cal.3rd 741, 167 Cal.Rptr.70, 614 P.2d 728 (1980) 27

Truax v. Corrigan, 257 U. S. 312, 42 S.Ct. 312, 66 L.Ed. 254 (1921) 10

Van Horn, M.D. v. Chambers, 1998 WL353802 (Decided July 3, 1998) 1,5

Van Horn, M.D. v. Chambers, 1998 WL226788 (Decided May 8, 1998) 1,4

Yick Wo v. Hopkins, 118 U. S. 356, 6 S.Ct. 1964, 30 L.Ed. 220 (1886) 10

Texts and Treatises

Antieau and Rich, *Modern Constitutional Law* (West Group 1997) 10

Restatement (Second) of Torts

Section 315 14,15,16,27

clause (a) iv,7,13,14,15,21,22,29

clause (b) iv,14,26,29

Sec. 319 ..... iv,7,13,15,16, 19, 21,19

Shapo, *The Duty to Act - Tort Law, Power, and Public Policy* (UT Press, 1977) 24

Tribal, *American Constitutional Law* (1978) 12

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS ENTERED IN THE CASE BY COURTS

Gage VAN HORN, M.D. v. Wallace Lee CHAMBERS, Annie Mae Chambers, and Edward Johnson (Tex. 1998) [Decided July 3, 1998],**1998 WL 353802**.

Gage VAN HORN, M.D. v. Wallace Lee CHAMBERS, Annie Mae Chambers, and Edward Johnson (Tex. 1998) [Decided May 8, 1998, opinion withdrawn on July 3, 1998], **1998 WL 226788**.

Tina CHAMBERS, Individually and as next friend of Tiahree K. Chambers; Wallace Lee Chambers; Annie Mae Chambers; and Edward Johnson v. HERMANN HOSPITAL ESTATE; The Hermann Trust; Hermann Hospital; Hermann Hospital, Inc.; and Gage Van Horn, **961 S.W.2d 177** (Tex.App.-Houston [1st Dist.] 1996, Decided April 25, 1996, Ordered Published and Rehearing and Rehearing En Banc Denied May 29, 1997.)

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

1. This is a petition for review by certiorari a judgment of the Supreme Court of the State of Texas, the highest court in Texas.

2. The date of the entry of the judgment sought to be reviewed is May 8, 1998.

3. The date of any order respecting a rehearing is July 3, 1998, the date on which Petitioners' Motion for rehearing was overruled by the Supreme Court of Texas.

4. 28 U.S.C. Sec. 1257 is believed to confer on the United States Supreme Court jurisdiction to review the judgment or decree in question by certiorari, because Petitioners specially set up and claimed in their Motion for Rehearing before the Supreme Court of Texas that its opinion and judgment denied Plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and the Supreme Court of Texas overruled their Motion for Rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fourteenth Amendment to the Constitution of the United States, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 13 of the Texas Constitution:

"All courts shall be open, and every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law."

CONCISE STATEMENT OF THE CASE

Ronald Chambers and Edward Johnson were employed by Hermann Hospital in Houston, Texas. While they were helping to restrain a patient in the hospital who had assaulted a nurse, the patient killed Chambers and injured Johnson. Petitioners (Chambers' parents and Johnson) sued the hospital and Van Horn, the patient's attending physician, for their damages.

The state District Court rendered a take-nothing summary judgment in favor of the hospital and Van Horn. The Texas First Court of Appeals in Houston affirmed the summary judgment in favor of the

hospital, and reversed the summary judgment in favor or Van Horn, holding that summary judgment for Van Horn was precluded by a genuine issue of fact as to whether under the circumstances Van Horn was under the duty imposed by common law to control the violent patient so as to prevent the death and injuries that occurred, and remanded the claims against Van Horn for trial. *Chambers v. Hermann Hospital Estate*, 961 S.W.2d 177 (Tex.App.-Houston [1st Dist.] 1996; Appendix, p. 33).

The Texas Supreme Court denied Petitioners' application for writ of error with regard to the affirming of the summary judgment for the hospital by the First Court of Appeals, and granted Van Horn's application for writ of error with regard to reversing of the summary judgment for Van Horn.

On May 8, 1998, the Supreme Court of Texas issued its opinion (*Van Horn, M.D. v. Chambers*, 1998 WL226788, (May 8, 1998, Appendix, p. 18) reversing the Court of Appeals, rendering a take nothing judgment in favor of Van Horn (Appendix, p. 31), and holding that as a matter of law that because he was a physician, Van Horn was excluded from the operation of the common law discussed by the Court of Appeals.

Plaintiffs timely filed their motion for rehearing, (Appendix, p. 96), asserting in Point One (Appendix, p. 101-102) that the Supreme Court's opinion and judgment denied them the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and further asserted in their motion (Appendix, p. 106):

> "This Court holds that regardless of the facts of the instant case or any other, as a matter of law a physician can have no "special relation" with a patient within the meaning of the exception of clause (a) of Section 315 (*Restatement, Second, Torts*). In violation of the 14th Amendment to the Constitution of the United States, which forbids any state to deprive any citizen within its jurisdiction the equal protection of the laws, this Court has given to Van Horn and to all physicians, *as a privileged class,* an absolute immunity from any liability under the exception of Section 315(a)."

On July 3, 1998, the Supreme Court of Texas overruled the motion for rehearing and withdrew its opinion of May 8, 1998 substituting therefor an opinion dated July 3, 1998 (which made no change its "no duty" conclusion in the earlier opinion), and left the judgment of May 8, 1998 in place. *Van Horn, M.D. v. Chambers*, 1998 WL353802 (July 3, 1998, Appendix,

p. 3). Petitioners ask the United States Supreme Court to grant certiorari to review the decision of the Texas Supreme Court, to reverse that decision, and to remand this case for trial of their claims against Van Horn.

ARGUMENT

Factual background

On April 20, 1991, a violently combative patient with seizures and alcohol withdrawal syndrome was brought to the emergency room of Hermann Hospital in Houston, Texas by the Fire Department, accompanied by his wife. With her consent, the patient was controlled with physical restraints and massive medication. The next day, the patient was transferred to the hospital's Neurological Critical Care Unit where Van Horn became his attending physician and ordered a continuation of these same control measures. On the afternoon of April 22nd, Van Horn ordered a discontinuation of the restraints and sedation, and transferred the patient to an unsecured, general nursing floor. The patient became increasingly agitated through the evening, and in the morning the patient assaulted a nurse. Ronald Chambers and Edward Johnson, employees of the hospital, responded to a emergency call to help restrain the patient. As they struggled with him, Chambers was killed and Johnson was injured.

FIRST POINT: The Texas Supreme Court denied Petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment by holding that Van Horn's status as a physician as a matter of law excluded him from operation of Texas common law imposing a duty upon an actor to exercise reasonable care to control a person in his charge that he knows or should know is likely to cause physical harm to others, as stated in *Otis Engineering Co. v. Clark*, 668 S.W.2d 307, 309-311 (Tex.1984) and restated in Section 315, clause (a) and Section 319, *Restatement, Second, Torts.*

Argument under First Point

(1) The Equal Protection clause

The Equal Protection clause in Section 1 of the Fourteenth Amendment of the U. S. Constitution obligates a state to provide to those within its jurisdiction the equal protection of its laws, guaranteeing that the power of the state will not be exercised in a manner that denies such equal protection.

Whether the Equal Protection clause applies does not turn not on whether the state has exercised its power in a particular form, but whether it has, in fact,

exercised its power. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed. 2d 686, 697 (1964). The Equal Protection clause applies not only when the power of the state is exercised by the acts of its legislature, but also when it is exercised through the decisions of its courts. The judicial branch of a state is bound by the Equal Protection Clause of the Fourteenth Amendment, and the mandate to maintain equality before the law and equal laws rests upon the state judiciary with as much force as upon the other branches of state government. *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), rehearing den. 346 U. S. 841, 74 S.Ct. 19, 98 L. Ed. 361 (1953). The decisions of state courts are state action within the meaning of the Equal Protection Clause. *Shelley v. Kraemer*, 334 U.S. 1, 17, 68 S.Ct. 836,844, 92 L.Ed 1161, 1182-1183 (1948).

In providing equal protection, a state may make reasonable classifications of persons subject to its laws, so long as equality within the class is maintained. For such classifications, the rule is:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons

similarly situated shall be treated alike.'"

Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971) [quoting from *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, 40 S.Ct. 560, 64 L. Ed. 989 (1920)].

Although strict judicial scrutiny will be made of classifications which involve an inherently suspect class or interference with the exercise of a fundamental right, the constitutional standard for other classifications requires that the classification be rationally related to a legitimate state purpose or interest. *Parham v. Hughes*, 441 U. S. 347, 351, 99 S. Ct. 1742, 1745, 60 L. Ed.2d 269 (1979); *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973). The requirement of rational relation is a prophylactic to the evil of using arbitrary classifications to deprive persons of equal protection of a state's laws. The Fourteenth Amendment guarantees freedom from arbitrary classifications made in their decisions by the courts of a state.

> "Freedom from truly arbitrary classifications should be deemed a fundamental right. That rationale elevates judicial protection and explains why such classifications are not only bad, but also unconstitutional. Freedom from arbitrary

classifications is, in effect, synonymous with freedom from arbitrary decisions. In this context, equal protection and substantive due process standards mean the same thing, and state classifications which violate one will also violate the other." --Antieau and Rich, *Modern Constitutional Law, Volume 2, Sec. 30.07, p. 225 (West Group 1997).*

In *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 1113, 86 L. Ed. 1655 (1942), this Court quoted from *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L. Ed. 220 (1886) to say:

"The guaranty of 'equal protection of the laws is a pledge of protection of equal laws."

In *Truax v. Corrigan*, 257 U.S. 312, 333, 42 S.Ct. 124, 130, 66 L. Ed. 254 (1921), this Court stated of the Equal Protection guaranty:

"Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class however limited, having the effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the

deprivation of right permitted worked against, a larger class."

In short, equal protection of the law implies that all litigants similarly situated may appeal to the courts for both relief and defense under like conditions, with like protection, and without discrimination, as was said by the Sixth Circuit in *Sexton v. Barry*, 233 F.2d 220 (6th Cir., 1956, cert. den. 352 U.S. 870, 77. S.Ct. 94, 1 L.Ed.2d 76 (1956).

(2) "The laws" of a state include its common law rules.

The Equal Protection clause requires the Courts to provide equal protection of the state's *common law* as well as its *enacted law*. In *Shelley v. Kraemer, supra,* this Court said:

> "It has been recognized that action of state courts in enforcing a substantive common-law rule formulated by those courts may result in denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." (334 U.S. at 17, 68 S.Ct. at 844, 92 L.Ed at 1182-1183 (1948), footnotes omitted.)

Similarly, *Nashville, C & St. L. Railway v. Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1258 (1940) said:

> "It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law."

See also Tribal, *American Constitutional Law*, Sec. 18-6 (1978).

(3) The common law in Texas is the rule of decision in the Texas courts.

Section 5.001, Tex.Civ.Prac.&Rem.Code states:

> *5.001 Rule of Decision.* The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or laws of this state, the constitution of this state, and the laws of this state.

The "common law of England" in the above statute means the common law as declared by the courts of the

several states, and not the common law in force in England in 1840. *Grigsby v. Reid*, 153 S.W. 1124 (Tex. 1913).

Ronald Chambers and Edward Johnson were not patients of Van Horn. There is no Texas statutory or constitutional provision as to what duty, if any, a physician has to control his patient so as to prevent harm to one who is not his patient. Thus, whether there was any such duty must necessarily be determined by the common law.

(3). The common law rule of duty so to control a third person to prevent harm to others.

The common-law rule of duty restated in clause (a) of Section 315, in Section 319, *Restatement, Second, Torts*, and in the prior decisions of the Texas Supreme Court discussed below, may be summarized as:

> An actor's duty to control the conduct of a third person to prevent him from harming others arises when there is a "special relation" with the third person with imposes that duty; and one such "special relation" exists where the actor takes charge of the third person and knows or should know that he is likely to cause bodily harm to others if not controlled.

This law of duty promotes social responsibility by the actor and protects and provides a remedy to victims who are injured by a breach of that duty.

The *Restatement, Second, Torts*, a compilation and distillation of the common law of torts as declared by the courts of the several states, provides in Section 315 that one person is generally under no duty to control the conduct of one person so as to prevent him from causing physical harm to another person, but recognizes in clauses (a) and (b) two significant ***"unless"*** exceptions to the general rule. Section 315 reads as follows:

> *Section 315. General Rule.* There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another ***unless***
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection." (emphasis added).

In *Otis Engineering v. Clark*, 668 S.W.2d 307, 309-311 (Tex.1984), the Texas Supreme Court adopted Section 315 as a correct statement of the common law,

holding that the relationships described in Section 319 of the *Restatement, Second, Torts* imposed certain duties upon the parties, stating:

> "As a general rule, one person is under no duty to control the conduct of another. *Restatement (Second) of Torts*, Sec. 315 (1965), even if he has the practical ability to exercise such control. *Trammell v. Ramey*, 231 Ark., 329 S.W.2d 153 (1959). **Yet, certain relationships do impose, as a matter of law, certain duties upon parties**. *See, e.g., Restatement (Second)* Sections 316-20." (p. 309, bold emphasis added.)

Section 319, *Restatement, Second, Torts* illustrates the the "unless" exception of clause (a) of Section 315, providing:

> *Section 319: Duty of Those in Charge of Persons Having Dangerous Propensities*. One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

In *Otis Engineering v. Clark, supra*, the employer knew that the employee was incapacitated by intoxication. He suggested that the employee go home. When the

employer inquired as to whether he was all right and could safely drive home, the employee replied that he was and could. The employer then permitted the employee to drive off the parking lot in his intoxicated, incapacitated condition. Shortly after leaving, the employee was involved in a fatal collision. The Texas high court held that a genuine issue of material fact was raised as to whether the employer had exercised control over the incapacitated employee, and then restated the duty of Sections 315 and 319 of the *Restatement (Second), Torts, supra* in its own phraseology:

> "One who voluntarily enters an affirmative course of action affecting the interests of another is regarded as assuming a duty to act and must do so with reasonable care. *Colonial Savings Ass'n v. Taylor*, 544 S.W.2d 116 (Tex.1976); *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922); *see* W. Prosser, *supra*, Sec. 56". (p.309)
>
> * * * * *
>
> "Therefore, the standard of duty that we now adopt for this and all other cases currently in the judicial process, is: *when, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to*

others. Such a duty may be analogized to cases in which a defendant can exercise some measure of reasonable control over a dangerous person when there is a recognizable great danger of harm to third persons. *See, e.g., Restatement (Second) of Torts, Sec. 319.*" (p. 311, emphasis added.)

Van Horn, the attending physician in the instant case, was entrusted with the body of a patient who by reason of seizures and alcohol withdrawal was violent and dangerous. Van Horn was given absolute power and control over the patient, which he exercised in fact. His control far exceeded the "control inherent in the master-servant relationship", which was the basis on which the Texas Supreme Court illogically "distinguished" *Otis Engineering Co., supra* (where the Court held the employer was under a duty to exercise care to so control his dangerous servant to prevent injury to others) from the instant case (where the Court held Van Horn was *not* under the same duty regarding his dangerous patient.)

In *El Chico Corp. v. Poole*, 732 S.W.2d 306 at 313 (Tex. 1987), the Texas Supreme Court held that an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to a patron when the licensee knows or should know that the patron is

intoxicated and to breach that duty is negligence as a matter of law. The Court quoted from *Buchanan v. Rose*, 159 S.W.2d 109, 110 (Tex. 1942), where in describing "duty" it had said:

> ". . . if a party negligently creates a situation, then it becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear that others in the exercise of their lawful rights may be injured thereby."

Here, Petitioners alleged that Van Horn, the attending physician of the hospitalized patient with a known propensity for violence, was negligent in transferring the patient to an unsecured, general nursing floor while at the same time discontinuing the physical and medicinal restraints that had effectively controlled the patient for the previous two days. The Texas Supreme Court even conceded that Van Horn's conduct might have been medical negligence:

> "On the other hand, if Van Horn acted on inadequate medical knowledge or improperly applied it to Long's situation, the doctor may have had a basis for continuing physical restraint or critical care. A failure to do so could amount to medical negligence, but only against one to

whom a duty is owed." Opinion, July 3, 1998, 1998WL353802, pp. 6-7 (Appendix, pp. 10,11).

In *Kerrville State Hospital v. Clark*, 923 S.W.2d 582 (Tex.1996) a hospital who exercised control-in-fact over a psychotic patient was sued by the parents of the patient's wife, whom the patient murdered, on a cause of action of failure to exercise reasonable care so to control the patient as to prevent him from hurting others. The trial court rendered judgment against the hospital and the Court of Appeals affirmed. The hospital applied to the Supreme Court for reversal on four grounds: (1) that the suit was barred by sovereign immunity, (2) that the hospital owed no duty to the plaintiffs, (3) that the actions of the hospital were not the proximate cause of the murder, and (4) that the trial court lacked proper venue. In a 5-4 decision, the Supreme Court reversed solely on the ground that the hospital has sovereign immunity (923 S.W.2d 583-584). The majority did not discuss the other grounds, but the dissent did, and as to the duty question, wrote that the hospital indeed had a duty to control the patient so as to prevent the death of the patients wife, and that this duty arose under ***both*** (1) the rule of *Otis Engineering Co. v. Clark, supra, **and*** (2) Section 319 of the *Restatement (Second) of Torts* (923 S.W.2d 587-598). In the name of equal protection, the Texas Supreme

Court should have held in the instant case that Van Horn was under the same duty, but it did not.

Instead, the Texas high court said that the instant case was controlled by its holding in *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex.1994) that a psychologist had no duty to child's father not to negligently misdiagnose the child. *Bird*, however, is inapposite to the instant case because in *Bird* the mental health professional treated the child on an *out-patient basis* only and *had not taken charge of or assumed control-in-fact over the patient*, whereas in the instant case, the patient was treated *in the hospital*, where Van Horn had taken charge of and had exercised *control in fact* over him through the control measures discussed above. *Bird* is also very different from the instant case in that, as the dissent in *Kerrville State Hospital, supra*, pointed out (868 S.W.2d at 769), the decision in *Bird* was based upon factors unique to its factual setting, such as the inherent difficulty in diagnosing sexual abuse in children and the social utility of encouraging a full investigation of claims of abuse, factors which have no bearing on a physician's duty of care to third persons who may be harmed by his dangerous patient.

(4). Other states have held that physicians are under the duty.

The high courts of other states hold that physicians have the duty of control under the circumstances stated in Section 315(a) and 319 of *Restatement, Second, Torts*.

In *Bradley Center, Inc. v. Wessner*, 296 S.E.2d 693, 695-696 (Georgia, 1982), the Georgia Supreme Court said that the Georgia Court of Appeals correctly stated the rule that

> "where the course of treatment of a mental patient involves an exercise of 'control" over him by a physician who knows or has reason to know that the patient is likely to cause bodily injury to others, an independent duty arises from that relationship and falls upon the physician to exercise that control with such reasonable care as to prevent harm to others at the hands of the patient."

The Georgia high court held that the physician had a special relationship with the patient within the ambit of one of the exceptions (clause a) of Section 315 and the ambit of Section 319, *Restatement, Second, Torts*. And in answer to the argument that the physician owed no duty to those who suffered harm because the privity of a physician-patient relationship required in malpractice cases did not exist, the Court replied:

"As we stated above, this is not a malpractice case; it is an ordinary negligence case in which privity has never been an essential element. Here, appellant hospital is liable to third parties because it violated its duty owed to those third parties to conform to a given standard of conduct."

In *Littleton v. Good Samaritan Hospital & Health Center*, 529 N.E.2d 449 (Ohio, 1988), the Ohio Supreme Court held that a "special relation" within the meaning of Rule 315(a) exists between a psychiatrist and a mental patient in a hospital setting, stating:

"Such a 'special relation' exists when one takes charge of a person whom he knows or should know is likely to cause bodily harm to others if not controlled. Restatement, *supra*, at 129, Section 319; see Restatement, *supra*, at 123, Section 315, Comment *c*.

Even though Theresa was a voluntary patient, we find that Dr. Murray had sufficient charge of Theresa in the hospital setting such that a special relation was established."

See also *Naidu v. Laird*, 539 A.2d 1064 (Delaware, 1988), holding that a psychiatrist owes a duty to persons other than the patient to exercise reasonable care in his treatment and discharge of the patient.

(5) Excluding physicians and victims harmed by their patients from operation of the common-law rule of duty denied equal protection to Petitioners.

In the instant case the Texas Supreme Court holds that *if the actor is a physician*, as a matter of law the duty imposed by the above-discussed common law rule to control a person in his charge who has violent propensities does not arise, regardless of any other facts, and the victims injured by the person in the physician's charge are unprotected by that rule of law. As a matter of law and without regard to any factual setting, physicians have now been placed in a *privileged* class to which that law does not apply. The flip-side is that victims injured by a dangerous patient hospitalized and in the charge of an attending physician have been placed in an *under-privileged* class from which the protection of that rule of law is withheld by the Texas Supreme Court. These classifications are arbitrary and have no rational relation to any legitimate state purpose or interest. In the phraseology of *Romer v. Evans*, 517 U. S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), it was a *status-based decision,* divorced from any factual context from which any relationship to legitimate state interest could be discerned, and something the Fourteenth Amendment's Equal Protection Clause does not permit.

A physician who exercises power and control-in-fact over a patient he knows or should know is likely to hurt other people should not be segregated from the duty that all other persons have who are in charge of dangerous person, which is to exercise reasonable care so to control that dangerous person to prevent injury to others. The power inherent in their status as physicians makes the Texas high court's exclusion of physicians from this duty especially unjust. Shapo, *The Duty To Act - Tort Law, Power, and Public Policy* (UT Press, Austin & London, 1977) argues that the *duty to act arises from power*; i.e., inherent in power is a corresponding duty, and posits that a physician has inherent power that

> "resides in information presently available only to one trained at a social premium with considerable infusion of public money and publicly licensed. And although it is an element hard to quantify, power also derives from dependence, rooted in a mystique, which is in turn fostered by an aura of competence and reliability that is inculcated partly by cultural tradition and partly by trade association propaganda." (p. 13-14)

Thus, Shapo speaks of ". . . the obligations that arise from the *power inherent in the physician's professional status*". (emphasis added, p. 133)

The right of a citizen to institute and maintain actions of any kind in the courts of the state has been recognized as a fundamental constitutional privilege ever since Justice Washington of the United States Supreme Court, presiding in *Corfield v. Coryell* at circuit (6 F. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823), delineated his oft-quoted views of what were the "privileges and immunities of citizens in the several states" referred to in Article Four of the Constitution of the United States. Similarly, a right to have a legal remedy in the courts is also provided by Article I, Section 13 of the Texas Constitution, to-wit:

> "All courts shall be open, and every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law."

The decision of the Texas high court that Petitioners have no remedy against Van Horn under the common-law rule discussed above *because Van Horn is a physician* lays an axe on the root of these guarantees of fundamental interests and the Fourteenth Amendment's guarantee of equal protection of the state's laws.

SECOND POINT: The Texas Supreme Court denied Petitioners equal protection of the laws by holding that although they were hospital employees helping with the violent patient in Van Horn's charge, as a matter of law Van Horn did not owe them the duty of protection from the patient's violence under Texas common law restated in clause (b) of Section 315, *Restatement, Second, Torts.*

Argument under Second Point

Clause (b) of Section 315, *Restatement, Second, Torts* (which Texas adopted in *Otis Engineering Co. v. Clark, supra)*, imposes a common-law duty upon a person so to control the conduct of a third person as to prevent him from causing physical harm to another whenever a "special relation" exists between the actor and the other which gives to the other a right to protection.

From the time the violent patient was brought to the emergency room of Hermann Hospital, those hospital employees who helped to control him were the targets of his violence. They were the ones that he kicked, hit, bit, and hurt. Ronald Chambers, Deceased and Edward Johnson were employees of the same hospital and members of the same class of persons toward whom the patient had demonstrated violence

from the beginning of his hospitalization. In spite of that, the Texas Supreme Court held as a matter of law that Van Horn had no "special relation" with Chambers and Johnson within the meaning of the exception in clause (b) of Section 315 because there was no evidence that Van Horn knew them before the occurrence.

In *Tarasoff v. Regents of University of California*, 551 P.2d 334 (1976), a patient who was treated only on an out-patient basis told his psychotherapist that he intended to kill a an unnamed woman when she returned from Brazil. The California Supreme Court held on the basis of Section 315, *Restatement (Second), Torts*, that the psychotherapist was under a duty to act with reasonable care to protect the woman from the patient's dangerous propensities. Then, in *Thompson v. County of Alameda*, 614 P.2d 728 (1980), the California Supreme Court held that the duty announced in *Tarasoff* ran to "a foreseeable or readily identifiable target". A number of cases have held that the *Tarasoff* duty to protect a "foreseeable or readily identifiable target" does not require identification of a *specific* victim, but rather the duty benefits *a class* of foreseeable victims. In *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185 (D.C. Nebraska 1980), the District Court said that foreseeability defines the scope of the duty to exercise due care, and if the health care providers in that case

could have reasonably foreseen an unreasonable risk of harm to the Plaintiffs *or to a class of persons of which the Plaintiffs were members*, they had a duty to the Plaintiffs to exercise due care. The same analysis was employed in *Petersen v. State*, 671 P.2d 230 (Washington, 1983).

The violence-control measures which were ordered and implemented by Van Horn in the hospital's Neurological Critical Care Unit were ordered not only to protect the patient, but also to protect those employees working in the hospital with or near the patient. Those employees were on a team, coached by Van Horn as attending physician. His health-care of the patient was administered and effectuated through such employees, and that relation gave the employees a right to protection by Van Horn from physical harm by the patient who was in his charge. Chambers and Johnson were two such employees, responding to an emergency call for help in restraining the patient, now loose on a general nursing floor. They were in the same class, with the same right to receive protection from the patient that the other employees had received, and under the Fourteenth Amendment they had a equal right to be protected by the laws imposing a duty of control on those in charge of dangerous persons. Van Horn failed to protect them from the patient; and to add insult to their injury, they were denied protection of those laws.

CONCLUSION AND PRAYER

Under the Texas rule of common law as it existed in April, 1991 under the prior decisions of the Texas Supreme Court and as restated in clauses (a) and (b) of Section 315 and in Section 319 of *Restatement, Second, Torts*, when Van Horn *took charge* of a person he knew or should have known was likely to cause bodily harm to others if not controlled, he also *took the duty to control* that person so as to prevent him from physically harming other persons, especially the employees of the hospital where the person was kept by Van Horn under his orders as attending physician. The holding and judgment of the Texas Supreme Court in the instant case that physicians have no such duty and that Van Horn had none in 1991 is inexplicable.

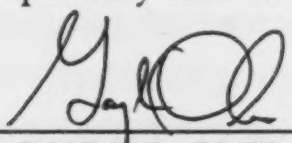
While this case was pending in the Supreme Court of Texas, the Texas Medical Association filed an *Amicus Curiae* brief supporting Van Horn's "no duty" defense, arguing that physicians should be excluded from the duty imposed by the aforesaid rule of common law, and pointedly noting that *it represented 34,000 physicians in the State of Texas*. Other professional associations representing the multiplied thousands of physicians in the United States are watching this case, as are the trial and appellate courts who will judge claims for relief

filed by persons injured by a patient in the charge of a physician who had opportunity and power so to control the patient to prevent such injury, but failed to do so.

Petitioners, who suffered tragically as a result of the April, 1991 occurrence, have no such organization, or influence, or power. They can only pray, as they here do, that this Honorable Court will, in the name of the sacred Constitution of the United States, correct the unjust and unconstitutional decision of the Texas Supreme Court which stood in front of the door and denied them admittance to the shelter of the Fourteenth Amendment's Equal Protection clause.

Petitioners ask the Supreme Court of the United States to reverse the Texas Supreme Court and remand this case to the state district court for trial.

Respectfully submitted,



GAYLE E. OLER
Texas State Bar #15254000
4054 McKinney Avenue
Suite 310, Dallas, Texas 75204
(214) 522-7282 --- (214) 559-3124 FAX
ATTORNEY FOR PETITIONERS